SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

No. 324

WESTSIDE LIQUOR COMPANY, a California Corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, and Numbered Therein No. 30427.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Prior Proceedings.

This is an appeal by a retail liquor licensee from the decision of the California Court of Appeal entered February 27, 1968 (reported in 66 Cal. Rptr. 435, 259 A.C.A. 532), in which a rehearing was denied on March 26, 1968 and a hearing in the Supreme Court of the State of California was denied on April 24, 1968, at which time the decision of the Court of Appeal became final. The decision of the Court of Appeal (which is

appended hereto as Appendix A) reversed an order of Harold F. Collins, Judge of the Superior Court of the State of California for the County of Los Angeles, denying the application of the Department of Alcoholic Beverage Control of the State of California for a writ of mandate directed to the Alcoholic Beverage Control Appeals Board of the State of California, which held in favor of the Appellant in an unreported decision, a copy of which is appended hereto as Appendix B.

Grounds on Which Jurisdiction of Supreme Court Is Invoked.

Appellant had its license revoked by the Deparment of Alcoholic Beverage Control of the State of California for sales of liquor below the mandatory retail prices which had been filed by liquor distributors with the State of California.

The decision of the Department was reversed on state grounds by the Alcoholic Beverage Control Appeals Board of the State of California. The Department applied for a writ of mandate to the Superior Court to reverse the Appeals Board. The writ was denied by the Superior Court of the State of California for the County of Los Angeles, and on appeal, the California Court of Appeal reversed the Superior Court and the Appeals Board so that the revocation of appellant's license was to go into effect. The judgment of the Court of Appeal of the State of California from which review is sought was entered on February 27, 1968. A rehearing was denied on March 26, 1968 and a hearing was denied by the Supreme Court of the State of California on April 24, 1968, at which time the decision of the Court of Appeal became final.

A Notice of Appeal to this Court was filed on July 2, 1968 in the Court of Appeal of the State of California.

The action by the Appeals Board in reversing the decision of the Department and the action of the Superior Court of the State of California in denying the Department's application for a writ of mandate left the license of appellant unaffected. It was not until the Court of Appeal reversed the Superior Court and the Appeals Board that the qeustion of the validity of the California statutes under federal grounds became relevant. In its petition for rehearing before the Court of Appeal and in its petition for hearing before the Supreme Court of the State of California, appellant raised the federal questions sought to be reviewed. The Court of Appeal denied a rehearing without opinion and the Supreme Court of the State of California denied a hearing without opinion. Appellant's petition for rehearing the Court of Appeal and petition for hearing in the Supreme Court of the State of California are included in the record on appeal.

This is an appeal pursuant to 28 U.S.C.A. § 1257(2). Among the cases sustaining jurisdiction are *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1264; and *Standard Oil Company of California v. Johnson,* 316 U.S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

The California laws which appellant claims to be in violation of the United States Constitution and the federal anti-trust laws are California Business and Professions Code, § 24755, a copy of which is appended hereto as Appendix C, and Title 4, California Administrative Code, Rule 99, a copy of which is appended hereto as Appendix D.

Questions Presented by This Appeal.

The questions presented by this appeal are as follows:

1. Whether the California Liquor Price Fixing Laws (§24755 of the California Business and Professions Code) are invalid as being in violation of the anti-trust laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether § 24755 of the California Business and Professions Code and Title 4, Rule 99, of the California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privileges for liquor manufacturers and wholesalers whereby the State of California at public expenses enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the state. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or, indeed any, safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

Facts Material to the Consideration of the Questions Presented.

Appellant holds a license to sell alcoholic beverages. This license was revoked after an administrative hearing by the Department of Alcoholic Beverage Control for a sale of alcoholic beverages below a minimum price filed by the manufacturer or brand owner of the alcoholic beverages in violation of § 24755 of the California Business and Professions Code.

Present counsel for appellant was substituted into the case after the cause had been submitted for hearing by the Court of Appeal but prior to the time it was decided by that court. Concurrently with the filing of the substitution of attorneys, appellant, through its new counsel, filed an application with the Court of Appeal to vacate the submission and for leave to file a brief on behalf of appellant as the real party in interest in said action presenting, among other things, the federal questions presented on this appeal. The application was denied by the Court of Appeal. Following the decision of the Court of Appeal appellant filed a petition for rehearing in which the federal questions were presented to the court. The petition for rehearing was denied without opinion. Thereafter appellant filed a petition for hearing by the Supreme Court of the State of California in which the federal questions were presented to the court. The petition for hearing by the Supreme Court of the State of California was denied without opinion.

The attitude of the California courts has been that the constitutional issues have been settled in California by virtue of the cases of *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal. 2d

349, 55 Cal. Rptr. 23 (1966), and *Reimel v. Alcoholic Beverage Control Appeals Board,* 256 A.C.A. 188, 64 Cal. Rptr. 26 (1968) (now before this Court as *Cohon v. Reimel,* October Term, 1967).

In addition to *Cohon v. Reimel* (October Term, 1967), there is pending before this Court *Samson Market Company, Inc. v. Kirby,* October Term, 1967. Both *Cohon v. Reimel* and *Samson v. Kirby* present substantially the same questions as are presented by this appeal. There are similar cases currently pending in the Appellate Courts of the State of California which present substantially the same questions as are presented by this appeal and which may ultimately be appealed to this Court.

Under § 24755 of the Business and Professions Code and Rule 99 of the Administrative Code of the State of California, the manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the Department of Alcoholic Beverage Control and publish the price list in a trade journal. Thereafter, the State of California, at no expense whatseover to the manufacturer, enforces his minimum price by gathering evidence and prosecuting violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The manufacturer may consult with the wholesaler or authorize the wholesaler to file the price on the manufacturer's behalf.

Further evidence that this law is purely for the benefit of liquor distillers and wholesalers and not for the public was sought to be brought out in various cases challenging the statute and rule before the Cali-

fornia courts. In the supplemental brief in the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra,* there was an attempt to introduce into evidence the speech of Malcolm E. Harris, at the time Director of the California Department of Alcoholic Beverage Control.

In this speech, which was refused in evidence, Mr. Harris noted numerous practices existing in the liquor industry which pointed to lack of free and open competition. In his speech before the liquor wholesalers and distillers Mr. Harris said:

> "At various times in the past nearly everyone in this room, either individually or through your trade associations, has complained to me that Fair Trade violations damage your business. The sections I have quoted give you the opportunity to collect for the damages you have alleged. Even though you may prove only one cent of damages, at least you will put the offending retailers on notice that you mean business with your Fair Trade contracts. Of course, if no suits for damages are filed after the Department has furnished evidence of violations, two logical conclusions could be drawn: First, *no one has been damaged* (emphasis added), and second, if no one has been damaged by Fair Trade violations, the state should not use its police power to enforce fair trade."

This is a clear statement by the Director that the purpose of Fair Trade in California is to benefit the distillers and not the public. He states that if the distillers and wholesalers are not damaged enough to want to institute actions themselves, then no one is damaged and the State of California should not enforce the provisions.

A Substantial Federal Question Is Involved in the Proposed Appeal.

Appellant alleges that Section 24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and further that it is in conflict with Sections 1 and 2 of the Sherman Anti-trust Act (15 U.S.C.A. 1 and 2). This State statute has been before the California Supreme Court twice in the last eight years, *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 346 P. 2d 737 (1959), and *Wilke & Holzheiser v. Department of Alcoholic Beverage Control, supra.*

The statute, as stated, is California's mandatory price fixing statute which provides for manufacturers to publish the price at which their brands are to be sold and the retail licensees are subjected to fines or suspension and/or revocation of license for sale below the filed price. In the *Allied Properties* case, *supra,* Superior Court Judge Albert Wollenberg (currently a United States District Court Judge for the Northern District of California, Southern Division) found the statute unconstitutional. On appeal, by a two to one decision of the California Court of Appeal, he was reversed and the statute was found constitutional. In 1959, by a four to three decision of the California Supreme Court, the Court of Appeal was affirmed and the statute was found constitutional. Neither an appeal nor a petition for certiorari were taken to the United States Supreme Court in that case.

In the case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control, supra,* the California Supreme Court, by a five to two decision in 1966, again declared the statute constitutional. After the California Supreme Courts' decision was final, application was made to a three judge District Court which decided *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F. Supp. 168 and held, at page 170 that:

> "A judgment upon the merits in a state court action is res judicata in a subsequent federal court action where the parties and the subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end . . . Plaintiff's remedy after the final judgment of the state courts was that of appeal or petition for certiorari to the United States Supreme Court."

Neither *Wilkie & Holzheiser* nor *Allied Properties* were appealed to the United States Supreme Court. This case and the other California cases currently pending before the United States Supreme Court are the first to tender to this Court the question of the Constitutionality of the California liquor price fixing statute.

In addition to the split which exists among the California judges themselves as to the constitutionality of the statute (in the original case involving liquor price fixing, *Allied Properties,* six judges held the statute constitutional and five held it unconstitutional), there

is a sharp division of authority among the highest courts of other states as to the constitutionality of similar price fixing statutes.

Most of the other state courts which have been confronted with similar liquor price fixing statutes have held them unconstitutional.

In *Reynolds v. Louisiana Board of Alcoholic Beverage Control,* La. 1966, 185 So. 2d 794, the Louisiana Supreme Court held its mandatory price fixing statute (similar to that of California) unconstitutional as violative of the Due Process Clause of the Federal Constitution. The court states at page 812 that the statute

> "bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignorable flight from competition."

A petition for certiorari was filed in the United States Supreme Court and was denied on November 14, 1966, U.S. Law Week 3173.

In addition, the California decision is in conflict with the decision of the Supreme Court of New Mexco in *Drink, Inc. v. Babcock,* 421 P. 2d 798, in which the court stated at page 803:

> "We hold that the fair trade contract and mark-up processes of the liquor control act are manifestly unreasonable legislation and are not an appropriate exercise of the States' police power . . ."

Such an act has also been held unconstitutional by the Florida Supreme Court in *Scarborough v. Webb's*

Cutrate Drug Company, (1942) 150 Fla. 754, 8 So. 2d 913, where the court states at page 922:

> "The act, upon its face, is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his consumers may be forced to sell liquor at a substantial profit . . ."

The court further stated at page 921:

> "There is not one thing in the act to indicate that there were any legislative findings that any necessity existed for the terms of the act nor is there any power or authority vested in any board to make any findings of fact in regard thereto. No hearing is provided for, no Due Process is contemplated, all of which are certainly necessary to make a price fixing act valid."

Similar price fixing statutes were held unconstitutional by Oklahoma in *Oliver v. Oklahoma Alcoholic Beverage Control Board*, 359 P. 2d 183 (1961); in Kansas in *State v. Mermes*, 358 P. 2d 936 (1961); in Illinois in *Lombardo Wine Co. v. Taylor*, 95 N.E. 2d 60 and in Nebraska in *Terry Carpenter v. Nebraska Liquor Control Commission*, 120 N.W. 2d 374.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it sets up a rule for liquor retailers that does not exist for any other retailers and because, with no basis for the distinction, two different trading areas are set up within the State

and the manufacturer can file one price for Northern California and another price for Southern California.

In *Wilke & Holzheiser, supra*, and *Allied Properties, supra*, as well as in the instant cases, the California Attorney General representing the Department of Alcoholic Beverage Control, has argued that the Twenty-First Amendment to the United States Constitution prevents any challenge of the California statute based on the United States Constitution.

In the Memorandum in Opposition to the Application for Stay Pending Appeal in the Supreme Court herein, the Attorney General for the State of California cites *State Board of Equalization v. Young's Market*, 299 U.S. 59, 63-64, (1936) stating:

> "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In the same Memorandum, the Attorney General for the State of California makes a great point of *Schwartz v. Kelly*, 140 Conn. 176, 99 A. 2d 89 (1953), in which a hearing was denied by the United States Supreme Court. This case was prior to the recent line of cases in which the Court has asserted the interdependence of the Twenty-First Amendment on the other provisions of the Constitution. Also, the Connecticut statute is somewhat different from California's in that in Conn. Gen. Stats., Vol. 6, paragraphs 30-64 and 30-65, price schedules remain in effect only for the period fixed by the Commission, are uniform throughout the State and the Commission has power to vary the minimum consumer price as the Commission deems necessary. Also, the Connecticut statute is now considerably different

from California's in that § 30-68A has been added so that there are minimum markups on the price of liquor, making the pricing not wholly within the discretion of the distillers as it is in California.

The position that the Twenty-First Amendment gives the liquor industry some "privileged status" has recently been substantially altered by the United States Supreme Court. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 12 L. Ed. 2d at 380, 84 S. Ct. 1293, the Court states at 12 L. Ed. 2d at page 356, that

> "To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd oversimplification."

Also the Supreme Court in 1966 held, in *Joseph E. Seagram v. Hostetter,* 86 S. Ct. 1254, that the Twenty-First Amendment must be read in light of the other Amendments of the Constitution and although the court upheld the New York law being questioned there, it clearly established the principle that the state law had to be a reasonable law and not deny the requirements of equal protection of the laws as provided by the Fourteenth Amendment. The Court, at 86 S. Ct. 1261, in analyzing whether or not the New York law violated the Anti-trust Act, stated:

> "Nothing in the Twenty-First Amendment of course would prevent enforcement of the Sherman Act against such a conspiracy."

See also: *Idlewild Bon Voyage Liquor Corp. v. Epstein,* (1962) 370 U.S. 713, 8 L. Ed. 2d 794, wherein

the court held that there was a substantial constitutional question raised. Here an action of the New York State Liquor Authority was being challenged.

As recently as this term, in *Burke v. Ford,* 19 L. Ed. 2d 554 (1967), the Supreme Court held Per Curiam that the District Court had jurisdiction to hear a case based on § 1 of the Sherman Act against all Oklahoma liquor wholesalers who allegedly were engaged in a statewide market division. Here, liquor was involved completely within the state's borders and Federal law was still held to apply.

Section 24755 of the California Business and Professions Code, which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face violates Federal anti-trust laws. Whenever a judicial obstacle is created, the statute is changed. When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement. The elimination of this requirement, as well as the discretion of liquor distillers, is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal *per se* under the Federal anti-trust laws unless the Federal exemption statutes apply. (See *United States v. McKesson & Robbins,* 341 U.S. 305, 309-311 (1953) and *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386-388 (1950).

Since the California statute does not provide for either free and open competition or contracts, it is not immunized from Federal anti-trust laws. *Eastman Kodak v. Federal Trade Commission,* 2d Cir., 330 U.S. 828, clearly held that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

California has not permitted the licensee before the California Administrative Agencies or Courts to present evidence of lack of free and open competition. See: *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787 and *Dave's Market v. Department of Alcoholic Beverage Control,* 222 Cal. App. 2d 671.

Analogizing the mandatory price-fixing characteristics of the statute herein to those of the normal fair trade statutes, is clearly misleading. As Justice Peters of the California Supreme Court states in his dissent in *Wilke & Holzheiser v. Alcoholic Beverage Control,* 65 Cal. 2d 349 at p. 381:

> "Thus, the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprise a mandatory price-fixing system whereby the producers or wholesalers of branded or trademarked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the state of civil and criminal sanctions upon non-complying retailers."

Then Justice Peters goes on to say, at pages 381 and 382:

> "The liquor fair trade law is to be distinguished from the general Fair Trade Act applicable to all branded or trademarked commodities sold at retail which are in free and open competition with others of the same general class. . . . The general act is permissive rather than mandatory. . . . It is enforced only by private suits, not by criminal penalties or revocation or suspension of licenses by an administrative body."

If this Court will hear this appeal, appellants can bring before this Court facts concerning the structure of the liquor industry which show that there is no real competition between the big four distillers who control 90% of the liquor business in the United States. As former State Assemblyman Caspar Weinberger, currently Finance Director of the State of California, stated in an article in the San Mateo Times on April 28, 1964:

> "No one has satisfactorily explained why the State should allow liquor distillers and others in the business to fix and maintain prices as high as they wish when any other business that attempted to do that would be indicted and convicted under the Anti-trust laws."

The perniciousness of liquor price fixing laws is well analyzed by the "Moreland Commission on the Alcoholic Beverage Control Law," appointed by Governor Rockefeller. It was the Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to

pass the present New York statute held constitutional in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L. Ed. 336, 86 S. Ct. 1254. The Moreland Commission found at page 1 of the report that:

> "The mandatory price controls should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

As the Commission pointed out, the only effect of mandatory price fixing could be to make drinking economically impossible for low income groups to the benefit of the wealthy and the disadvantage of the poor. This would appear to be a distinction in violation of the Equal Protection Clause of the Fourteenth Amendment since, in effect, it would enact prohibition for the poor but not for the rich.

Further, it has been pointed out to the licensees that the Supreme Court of the United States is the only court available now to rule on the constitutionality of the California statute. In *Dave's Market v. Department of Alcoholic Beverage Control,* (U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103) a three Judge District Court was convened but sent the matter back for determination on state issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the state issues and therefore, appeal to the Supreme Court of the United States was the only remedy. This was also essentially the decision in the District Court case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F. Supp. 168.

Conclusion.

In conclusion, the effect of allowing a system within the most populous state whereby an industry dominated by four giants has powers denied to any other business, is far reaching. The effects on interstate commerce, as pointed out in *Burke v. Ford, supra,* are clear. The liquor comes into California from outside the state and the consultations that go on between wholesalers who represent various distillers and the distillers they represent, in order to set the most profitable price, provide avenues for legalized conspiracy that can affect prices in all states. The Twenty-First Amendment allows a state to forbid the sale of liquor within its borders, but like the familiar analogy of the corporate entity, once liquor is sold within a state the laws under which it is sold must be reasonable and non-discriminatory, and they must have some rational foundation and not merely be designed to serve one powerful interest group. The Twenty-First Amendment was certainly not designed to put the liquor industry into a more favored position than it had been prior to the passage of the Eighteenth Amendment as would be the situation if the Supreme Court of the United States allows § 24755 of the Business and Professions Code of California to remain in effect.

Dated at Los Angeles, California July 3, 1968.

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(APPENDICES FOLLOW)